

Staff Summary Report



Council Meeting Date: 12/12/02

Agenda Item Number: 38

SUBJECT: Set public hearings for January 9 and January 16, 2003 to authorize the Mayor to enter into a license with AGL Networks, LLC to operate a telecommunication network.

DOCUMENT NAME: 20021212cacc03 AGL NETWORKS, LLC (0802-27) Ordinance No. 2002.55

SUPPORTING DOCS: Yes

COMMENTS: N/A

PREPARED BY: Janis L. Bladine, Assistant City Attorney (350-8609)

REVIEWED BY: Marlene A. Pontrelli, Deputy City Attorney (350-8120)

LEGAL REVIEW BY: Marlene A. Pontrelli, Deputy City Attorney (350-8120)

FISCAL NOTE: At this time, AGL is not serving as an interstate telecommunications network and no payment will be received. If AGL's uses change at some point to serving as an interstate telecommunication network for which the City is permitted to charge a fee, then AGL has agreed to pay a fee of \$2.20 per lineal foot of public right-of-way occupied, and \$0.74 for all others.

RECOMMENDATION: That the City Council authorize the Mayor to sign the License Agreement with AGL Networks, LLC.

ADDITIONAL INFO: AGL Networks, LLC, has applied to the City for the installation, placement, operation and maintenance of an underground optical fiber based, telecommunications system in, on, under, upon, along and across certain public rights-of-way and easements within the City. The license agreement grants such right to AGL for a period of five years.

ORDINANCE NO. 2002.55

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY
OF TEMPE, ARIZONA, AUTHORIZING A
TELECOMMUNICATIONS LICENSE TO AGL
NETWORKS, LLC.**

R E C I T A L S:

1. WHEREAS, AGL Networks, LLC, a Delaware limited liability company ("Licensee") has applied to the City for the installation, placement, operation and maintenance of an underground optical fiber based, telecommunications system in, on, under, upon, along and across certain public rights-of-way and easements within the City; and

2. WHEREAS, by such authority as may be conferred by Title 9 the Arizona Revised Statutes, and statutes amendatory thereto, the Tempe City Charter, Tempe City Code, and state law, the City is desirous of entering into a license agreement with Licensee.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

Section 1. That a license be granted to AGL Networks, LLC.

Section 2. That the Mayor of the City of Tempe is hereby authorized to execute the License document and all other necessary documents to effectuate the license granted herein.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this _____ day of _____, 2003.

MAYOR

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

TELECOMMUNICATION LICENSE ISSUED TO
AGL NETWORKS, LLC

This License, is issued by the City of Tempe (hereinafter called "Licensor" or "City"), a municipal corporation, to AGL Networks, LLC, a Delaware limited liability company (hereinafter called "Licensee").

WHEREAS, Licensee has applied to the City for a License for the installation, placement, operation and maintenance of an underground optical fiber based, telecommunications network in, on, under, upon, along and across certain public rights-of-way and easements within the City;

WHEREAS, by such authority as may be conferred by state and federal law, the Tempe City Charter, and Tempe City Code; and

WHEREAS, pursuant to ordinance adopted by the City, the City Council has authorized the Mayor to execute a license with Licensee to construct, install, operate, and maintain a telecommunications network in, along, under, over and across certain streets and public ways within the City; and

NOW, THEREFORE, the Licensor hereby grants to the Licensee the License as follows:

SECTION 1. License Granted.

There is granted to Licensee a fully paid up, revocable and nonexclusive license to construct, repair, maintain, replace, operate, lease, install, remove, and upgrade, in, on, under, upon, along and across the public right-of-way and easements in the City, telecommunications network facilities, conduit, innerduct, fiber optic cables and appurtenances (the "Telecommunications Network"), subject to the applicable provisions of this license, the City Charter, City Code and any future amendments, together with all applicable laws and reasonable regulations of any regulatory agency having competent jurisdiction (the "License").

This License does not allow one-way transmissions by anyone directly to customers or any other type of video programming or other programming or transmissions that may be subject to a cable television license. For purposes of this License, "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. The term does not include commercial mobile radio services or cable services as defined by Arizona Revised Statutes, § 9-581.

Licensee's initial Telecommunications Network authorized by this License may be constructed, installed, operated, leased and repaired, replaced and maintained along the routes generally depicted on the map attached and made a part of this License as Exhibit A ("Initial

Routes”), and as will be more specifically depicted on engineering drawings provided to the City by Licensee. These routes are subject to change based on final engineering by Licensee, with all routes and changes to be subject to the approval of the City Engineer, which approval will not be unreasonably conditioned, delayed or withheld.

At any time during the term of this License and upon having made proper application to the City Engineer as specified in this License and having complied with the terms and conditions of this License, Licensee may expand and/or extend (construct, install, upgrade and operate) its Telecommunications Network within that shaded area on either side of Licensee's Initial Routes (“Expansion Area”), shown on Exhibit A, without further approval of the City Council of the City.

Any expansion and/or extension of Licensee's Telecommunications Network outside the Expansion Area (“Additional Expansion Areas”) shall require the specific consent of the City Manager (who has sole discretion to refer the matter to the City Council), provided that consent, by either the City Manager or the City Council, shall not be unreasonably conditioned, withheld or delayed. If Licensee is granted consent to expand and/or extend its Telecommunications Network into the Additional Expansion Areas by the sole action of the City Manager or by action of the City Council absent any amendment of this License, Licensee agrees that any expansions and/or extensions into the Additional Expansion Areas shall be at all times governed by the terms and conditions of this License.

SECTION 2. Conditions.

A. The Telecommunication Network constructed, installed, operated, leased and repaired, replaced and/or maintained pursuant to this License shall be constructed, installed, operated, leased and repaired, replaced and/or maintained in accordance with established practices with respect to public rights-of-way and easements, and the public rights-of-way and easements under the control of the City shall be used according to plans approved by the City Engineer, provided that approval shall not be unreasonably conditioned, withheld or delayed.

B. The Telecommunications Network to be constructed, installed, operated, leased and repaired, replaced and/or maintained, upgraded and removed under this License, shall be so located or relocated as to interfere as little as possible with traffic or other authorized uses within public rights-of-way and easements. Those phases of construction and/or installation relating to traffic control, backfilling, compaction and paving, as well as the location or relocation of the Telecommunications Network shall be subject to the reasonable and non-discriminatory regulation by the City Engineer.

C. If Licensee damages or disturbs the surface or subsurface of any public right-of-way, easement or adjoining public property or any public improvement or facility and such damage is not the result of inaccurate location marking by the City, Licensee shall promptly, at its own expense, and in a manner reasonably acceptable to the City, repair the damage or disturbance. If the Licensee fails to complete such repair within a reasonable time or in a manner reasonably acceptable to the City, then City may perform such repair and Licensee shall pay all the reasonable and fully documented direct costs expended in such repair of such City facility. If

the City establishes that such damage is due to Licensee's sole negligence or willful misconduct then Licensee may also be liable for a surcharge in accordance with Tempe City Code Section 29-19, but in no event greater than fifty thousand dollars (\$50,000) per incident.

D. In the event of a public emergency, City shall have the right, upon reasonable advance notice to Licensee, to sever, disrupt, or dig-up facilities of Licensee, after all reasonable efforts have been made, given the constraints of such public emergency, (i) to contact Licensee prior to any such action and (ii) to reasonably avoid severing, disrupting or digging up the facilities of Licensee. City shall, where reasonable, work with Licensee in responding to the emergency. A public emergency shall be any condition which poses an immediate threat to the safety or welfare of the citizens of City.

E. Licensee shall bear the entire cost of timely relocating its Telecommunications Network facilities, cables and appurtenances located within public rights-of-way and easements, the relocation of which is necessitated by the construction of public improvements by or on behalf of the City. If Licensee is required to relocate its Telecommunications Network facilities due to the construction of a public improvement, the City shall provide Licensee with written notice, at least one hundred twenty (120) days before any required action of Licensee to relocate affected portions of the Telecommunication Network and shall cooperate with Licensee to identify a replacement and alternative public right-of-way for the relocation of affected portions of the Telecommunications Network. Within one hundred twenty (120) days after service of notice by the City, Licensee shall remove the designated portions of the Telecommunications Network, and, if requested, restore the sidewalks and other rights-of-way to a condition comparable to the condition before the construction of the public improvement at its sole cost and expense. The City will make every reasonable effort to design and construct projects pursuant to this section so as to avoid relocation expenses to Licensee. The City will not exercise its right to require the Licensee's Telecommunications Network to be relocated in an unreasonable or discriminatory or arbitrary manner.

F. The License granted is for the Licensee only and any transfer of control of the Telecommunications Network to any third party who is not also licensed or otherwise authorized by the City is prohibited without obtaining an amendment to this License except for transfers permitted by Section 7.

G. Licensee shall post a cash deposit in the sum of Fifty Thousand Dollars (\$50,000.00) as security for the faithful performance by it of all the provisions of this License. This cash deposit shall remain in effect during the period of construction of Licensee's Initial Routes. Licensee may cancel this cash deposit, and the City will promptly refund the cash deposit to Licensee upon completion of construction of the Initial Routes provided there are no outstanding claims against Licensee resulting from said construction. City may draw upon the cash deposit if, after giving Licensee thirty (30) days notice and an opportunity to cure, Licensee fails to cure any default under this License Agreement. Within thirty (30) days after notice to Licensee that any amount has been withdrawn from the cash deposit, Licensee shall restore the deposit to its initial amount. City may request an additional cash deposit in the same amount during construction by Licensee in the Expansion Areas or Additional Expansion Areas.

H. Licensee shall indemnify, protect, defend and hold harmless the City, its council members, officers, employees, and agents (collectively "Indemnitees") from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all related costs and expenses incurred, including, without limitation, reasonable attorney's fees and costs of defense (collectively "Damages") to the extent arising in whole or in part, from Licensee's acts or omissions in its exercise of this License. Licensee's indemnity obligations hereunder shall not be applicable to Damages to the extent caused by or arising out of or in connection with the negligence, intentional acts or omissions or willful misconduct of Indemnitees or any of them.

I. If the FCC, Federal or State government, or the courts, in the future, permit the City to receive compensation for the use of the public rights-of-way to provide telecommunications services, the City and Licensee shall negotiate in good faith a mutually agreeable amendment to this License to include this compensation. The City represents and warrants that it will not discriminate among licensees in its rights-of-way in the application by the City of any such compensation.

J. Any privilege claimed under this License by the Licensee in any public street or other public property shall be subordinate to any prior or subsequent occupancy or use by the City or any other governmental entity, and shall be subordinate to any prior lawful occupancy or use by any other person, and shall be subordinate to any prior easements; provided, however, that nothing in this License shall extinguish or otherwise interfere with property rights established independently of this License. To the extent it is able to do so, the City warrants that it will make the privileges of this License superior to any subsequent license or lawful occupancy or use granted by the City.

K. Whenever the Licensee shall cause any opening or alteration whatever to be made for any purpose in any public streets, public places or property of third parties, the opening or alteration shall be completed and restored with due diligence within a reasonably prompt time. The Licensee shall upon the completion of the opening or alteration, restore the property, improvements or landscaping disturbed to a condition substantially comparable to the condition before the opening or alteration and the restoration shall be performed with due diligence within a reasonably prompt time.

L. Licensee shall maintain As-Built Drawings of its facilities located within the public rights-of-way and easements, furnish a copy to the City and participate as a member of the Arizona Blue Stake Center or other appropriate organizations that will facilitate the location and identification of its underground facilities, and shall comply with A.R.S. § 40-360.21 et seq., regarding Underground Facilities.

M. Licensee shall maintain a local agent within Maricopa County, who is familiar with the Licensee's facilities and who is responsible for satisfying the information needs of the City and other right-of-way users.

N. Licensee will provide conduit, innerduct and dark fiber optical cable infrastructure and will not provide transmission or lit services over its facilities. The Telecommunications

Network to be established by the Licensee will be of such limited scope that it shall not constitute an intrastate telecommunications network. Licensee does not have to obtain a Certificate of Convenience and Necessity ("CC&N") from the Arizona Corporation Commission and is exempt from any requirement by Licensor that the Licensee obtain a CC&N.

1. If the Licensee's uses of the Telecommunications Network changes to serving as an intrastate telecommunications network, Licensee shall provide the City with notice within 30 days following this change and shall obtain a CC&N from the Arizona Corporation Commission. If the Licensee's uses of the Telecommunication Network change to serving as an interstate telecommunication network for which the City is permitted to charge a fee, then Licensee shall provide the City with notice within 30 days following this change. In the event of such a change, the Licensee shall pay a fee of \$2.20 per lineal foot of public right-of-way occupied and built out by the Licensee with its fiber optics communications system, for all arterial streets, and \$0.74 per lineal foot of public right-of-way occupied and built out by the Licensee for all other public streets, roads, and alleys.
2. The City may confirm Licensee's compliance with the terms of this Agreement by requesting the opportunity to inspect records of the Licensee in accordance with the conditions set forth in Section 9 of this License. If Licensee determines that to respond to City's request for documentation and inspection that it must reasonably provide proprietary information, Licensee shall designate its claim to proprietary treatment on the documents provided to the City.
3. Proprietary information disclosed by the Licensee means any document or material clearly identified as confidential ("Proprietary Information"). Proprietary Information shall include, but not be limited to, any customer lists, financial information, technical information, or other information clearly identified as confidential pertaining to the services provided by the Licensee to its customers.
4. Proprietary Information disclosed by the Licensee to the City or its constituent departments shall be regarded as proprietary as to third parties. If the City receives a request to disclose Proprietary Information, the City shall notify Licensee of the request and allow Licensee a reasonable opportunity to defend its information from disclosure.

O. If the Licensee enters into a license agreement with another similarly situated municipality within Maricopa County, Arizona that grants to the other municipality, rights or financial benefits that are more beneficial to such municipality than what is provided by this License, the City shall have the right to agree to and amend this License to reflect the same or substantially similar terms of such other license. If the City enters into a license agreement with another licensee that grants the other licensee rights or financial benefits that are more beneficial to such licensee than what is provided by this License, Licensee shall have the right to agree to and amend this License to reflect the same or substantially similar terms and conditions of such other license.

P. The parties agree that this License is intended to satisfy the requirements of the applicable laws, administrative guidelines, rules, order and ordinances (collectively referred to as the "Applicable Law"). Accordingly, any provision of this License which conflicts with the Applicable Law shall be invalid and unenforceable, whether occurring before or after execution of this License, it being the intention of the parties: (i) to preserve their respective rights and remedies under the Applicable Law, and (ii) that the execution of this License does not constitute a waiver of any rights or obligations by either party under the Applicable Law. In the event that a provision is invalid and unenforceable, all other provisions shall remain in full force and effect. Both the City and Licensee expressly reserve all rights they may have under law to the maximum extent possible; neither the Licensor nor the Licensee shall be deemed to have waived any rights they may now have or may acquire in the future by entering into this License.

SECTION 3. Plan Approval, Permits and Inspection.

A. Before the start of construction or repair work (other than emergency repairs) within public rights-of-way, easements or City-controlled property, plans showing the proposed location of facilities to be constructed in relation to the location of other known adjacent conduit and facilities, shall be submitted to the City Engineering Department for its review and approval. These plans shall be prepared and submitted in accordance with the Tempe Procedure Manual for securing a permit for utility construction in the public right-of-way and easements, a copy of which has been provided to Licensee. At the time of construction, the constructor shall obtain a right-of-way permit and provide proof of insurance as reasonably required by the City. The fee for the right-of-way permit, shall be in addition to the costs of any other permit, license, or other documents required by existing applicable federal, state or local laws. During construction, the City will inspect all trenching, backfilling, and other related items and Licensee shall reimburse the City its actual, reasonable and documented inspection costs.

B. Licensee shall pay the City Engineering Department the amount billed monthly for the actual fully documented direct cost of the City's inspection and review services incurred during the previous month due to construction activities of the Licensee in the public right-of-way. The amount shall be due within thirty days of receipt of the monthly billing. Licensee shall have the right during regular office hours to examine and to make copies of the City accounting records on time and cost incurred for inspection services provided to Licensee for work in the public right-of-way.

C. Licensee shall be responsible for maintaining accurate and current records of the location of all facilities and furnish this information upon request to the City.

SECTION 4. Installation of Telecommunications Network.

A. Except as otherwise provided by this License or permitted by the City, all of Licensee's installations and Telecommunications Network within the City's right-of-way shall be underground and shall meet the standard specifications and reasonable requirements of the City.

B. The Licensee's installation of the Telecommunications Network shall be reasonably coordinated with other utilities to accommodate opportunities for common trench installation along with other utility undergrounding. All installations shall be in conduit or innerduct as reasonably approved by the City Engineer. Provided, however, nothing herein shall require Licensee to incur any material additional expense to accommodate common installations.

SECTION 5. Insurance Requirements.

Licensee shall at all times during the term hereof, at its own cost and expense, carry and maintain, for the mutual benefit of the City and Licensee, general public liability insurance against claims for bodily injury, death or property damage occurring on or about Licensee's telecommunications network facilities, cables and appurtenances, which insurance shall cover claims as may be occasioned by the act, omission or negligence of Licensee or its officers, agents, representatives, employees or servants during all times that this License is in effect. Insurance limits are inclusive of umbrella coverage.

A. Minimum Limits of Insurance

Licensee shall maintain limits no less than:

1. Commercial General Liability: \$5,000,000 combined single limit per occurrence for bodily injury and property damage, including coverages for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products and completed operations. The general aggregate limit shall apply separately to this project/location or the general aggregate shall be twice the required occurrence limit.
2. Automobile Liability: \$5,000,000 combined single limit per accident for bodily injury and property damage, including coverages for owned, hired, and non-owned vehicles as applicable.
3. Workers Compensation and Employers Liability: Workers Compensation and Employers Liability statutory limits as required by the State of Arizona.

B. Self-Insured Retentions

Any self-insured retentions must be declared and approved by the City. At the option of the City, either the insurer shall reduce or eliminate deductibles or self-insured retentions as respects the City, its officials, employees, and volunteers, or the Licensee shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

C. Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages
 - a. The City, its officials, employees, and volunteers are to be covered as additional insureds as respects: liability to the extent arising out of the acts or omissions of Licensee or Licensee's employees, agents or contractors; products and completed operations of the Licensee used or directly related to this License; or automobiles owned, leased, hired or borrowed by the Licensee. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, or volunteers.
 - b. The Licensee insurance coverage shall be primary as respects the City, its officials, employees, and volunteers, as it may relate to any covered activities set forth in Section 5.C.1.a, above. Any insurance or self-insurance maintained by the City, its officials, employees, or volunteers shall be in excess of the Licensee's insurance and shall not contribute to it.
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, or volunteers.
 - d. Coverage shall state that the Licensee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
2. Workers' Compensation and Employers Liability Coverage

The insurer shall agree to waive all rights of subrogation against the City, its officials, employees and volunteers for losses arising from work performed by the Licensee for the City.

3. All Coverages

Each insurance policy required by this License shall be endorsed to state that the coverage shall not be suspended, voided, and/or cancelled by either party, materially reduced in coverage or in limits except after thirty (30) days prior written has been given to the City's Risk Manager. (See address for Risk Manager under "Questions" in this Section.)

D. Insurance Related Requirements:

Licensee shall:

1. Before the commencement of any work or services under the License, Licensee shall furnish the City with certificates of insurance. The certificates shall be in form reasonably acceptable to the City's Risk Manager (or designee). The insurance certificates shall clearly evidence all insurance required in this License and provide that the insurance shall not be cancelled, allowed to expire or be materially reduced in coverage except on 30 days prior written notice to the City.
2. Replace certificates, for any insurance expiring before the completion of services.
3. Maintain insurance from effective date of this License until its expiration, cancellation or termination. If insurance is not maintained, City may purchase insurance for the Licensee and invoice Licensee for the cost of the insurance.
4. Place insurance with insurers and agents licensed and authorized to do business in Arizona and having a Best's rating of no less than A-, XIII.
5. Maintain insurance coverage continuously throughout the term of this License. If the required insurance is provided under a claims-made policy extending coverage to events occurring during the License term but giving rise to claims made after expiration of the License, the coverage shall be maintained without lapse for a period of five years beyond the expiration, cancellation or termination of this License.

E. Sublicensee

Licensee shall include all subcontractors and/or insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all the requirements stated herein for the Licensee.

F. Safety

The Licensee shall be solely and completely responsible for conditions of the job site, including safety of all persons (including employees) and property during performance of the work, except to the extent the conditions are affected by or impacted by City employees or other third persons licensed or authorized by the City to perform work in or to use the City streets or rights-of-way. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to all applicable federal (including OSHA), state, county, and local laws, ordinances, codes, and regulations. Where any of these are in conflict, the more stringent requirement shall be followed. The Licensee's failure to thoroughly familiarize itself

with the aforementioned safety provisions shall not relieve Licensee from compliance with these provisions.

G. Questions

Any questions relative to insurance requirements may be referred to Risk Manager, City of Tempe, 20 East Sixth Street, Tempe, AZ 85281, (480) 350-8245.

SECTION 6. Term of license; Cancellation; Termination; Removal or Abandonment at Expiration.

A. The License shall continue and exist for a period of five (5) years from the effective date unless sooner cancelled or terminated as provided in this section. Unless otherwise cancelled or terminated, the Licensee shall have the right to renew this License in accordance with Section 6.F hereof for additional five (5) year terms on the same terms and conditions.

B. The Licensee may cancel this License before the date of expiration by providing the City with ninety (90) days express written notice of cancellation.

C. The City may revoke, alter, suspend, or cancel the License before its date of expiration in the event that:

i. Licensee has failed to comply with any material provisions of this License or has, by act or omission violated any material term or condition of the License;

ii. The Licensee has failed to materially comply with any lawful rule or regulation validly adopted by the City Council that is material to compliance with the License;

iii. The Licensee has failed to maintain facilities and operations in the streets and public ways substantially in accordance with the standards prescribed by the City for safety, operation, maintenance, and general work in the streets and public ways according to City requirements and codes; or

iv. The Licensee sells, leases, assigns or transfers control of this License without prior consent of the City when such consent is required pursuant to this License.

D. Before modifying or terminating this License, the City Manager must make written demands that the Licensee do or comply with any applicable requirement, rule or regulation. If the failure of the Licensee continues uncured or uncorrected for a period of sixty (60) days following written demand, the City Manager may place his request for termination of this License upon the next regular City Council meeting agenda; provided, however, that if the default cannot reasonably be cured or corrected within the sixty (60) day period, if Licensee shall proceed promptly to cure the same and prosecute the curing with due diligence, the time to cure

the default shall be extended for a period of time as may be reasonably necessary to complete the cure. The City Manager shall cause to be served upon the Licensee, at least thirty (30) days before the date of the City Council meeting, a written notice of the intent to request termination, and the time and place of the meeting, notice of which shall be published by the City Clerk at least once thirty (30) days before the meeting in a newspaper of general circulation within the City. The City Council shall consider the request of the City Manager and shall hear from any interested persons, and shall determine, in its discretion, whether or not any failure by the Licensee was with just cause and rule as follows:

- i. If the failure by the Licensee was with just cause the City Council shall direct Licensee to comply within the time and manner and upon the terms and conditions as are reasonable; or
- ii. If the City Council shall determine the failure was without just cause, then the City Council may, by resolution, declare that the License shall be terminated and forfeited unless Licensee comes into compliance with the terms of the License within the reasonable period of time as determined by the City Council.

E. Upon the expiration, cancellation or termination of this License, Licensee shall, if requested by the City, remove its Telecommunications Network located in the public rights-of-way and easements within the City. Alternatively, at the City's option, and at the direction of and according to the reasonable specifications as may be promulgated by the City Engineer, Licensee may, at its sole expense, leave the Telecommunications Network in place.

F. At any time during a two-year period before the expiration of this License, the Licensee may apply to the City for a renewal or extension of the License in accordance with then existing federal, state and City laws. Unless Licensee is in breach of a material term or condition that has not been cured under the terms of Section 6.D, above, this License will be renewed or extended.

G. If Licensee abandons the Telecommunications Facilities installed and operated pursuant to this License, the Telecommunications Network within the City's right-of-way shall revert to City ownership.

SECTION 7. Nonassignment.

This license and the rights granted by this License shall not be assigned without the prior express written consent of the City, which consent shall not be unreasonably conditioned, withheld or delayed. Consent shall not be required if the proposed assignee is a subsidiary or affiliate of Licensee, or the result of a merger, consolidation, acquisition or the sale of all or substantially all Licensee's assets or is a commercial lending institution designated from time to time by the party wishing to assign or its affiliates as security for financing purposes. The prohibition on assignment shall not apply to Licensee selling or leasing use of its fiber optic cable capacity or leasing innerduct or dark fiber in the normal course of its business, provided that the Licensee remains solely responsible for locating, placing, installing, maintaining, relocating and

removing the facilities, unless the assignee has received a license from the City. To the extent feasible and not otherwise Proprietary Information, the Licensee shall notify the City of the name(s) of all entities who are utilizing such facilities. In the event that the Licensee sells any of its fiber or conduit to another entity, the Licensee shall notify the City of such sale and shall notify the buyer of the need to obtain a license from the City. Any assignment or transfer shall not require consent of the City when the License is transferred, assigned, or sold to a company owned, managed or controlled by Licensee or any of its affiliates, parents or subsidiaries.

SECTION 8. Nonexclusive License.

The License is not exclusive, and shall not be construed to prevent the City from granting other like or similar licenses, grants or privileges to any other person, firm or corporation, or to deny to or lessen the powers and privileges granted the City under the Constitution and laws of the State of Arizona.

SECTION 9. Records.

The City may inspect all of Licensee's books and records directly related to Licensee's compliance with the requirements of this License at Licensee's offices at any time during regular business hours upon five (5) business days' prior written notice, so long as such inspection occurs no more often than once per 12 consecutive months and is conducted in such a way as to minimize any disruption to Licensee's business operations.

SECTION 10. Partial Invalidity.

If any section, paragraph, subdivision, clause, phrase or provision of this License shall be adjudged invalid or unconstitutional, the same shall not affect the validity of this License as a whole or any part of the provisions of this License other than the part adjudged to be invalid or unconstitutional.

SECTION 11. Condemnation by City.

The City reserves the right to acquire all of the Telecommunications Network of Licensee used in the conduct of this License by the exercise of the right of eminent domain in accordance with the conditions set forth in the Arizona Revised Statutes.

SECTION 12. Acceptance of License Terms and Conditions.

This License shall not become effective until written acceptance has been filed by Licensee with the City Clerk of the City of Tempe. By accepting this License, Licensee covenants and agrees to perform and be bound by each and all of the terms and conditions imposed by the Charter and Code of the City and this License. Acceptance by Licensee must occur within one hundred and eighty (180) days of the enactment of this License by ordinance or else the License is void.

SECTION 13. Notices.

All notices which shall or may be given pursuant to this License shall be in writing and transmitted by registered or certified mail, return receipt requested, addressed as follows:

If to the City: City of Tempe
 City Manager
 P.O. Box 5002
 31 East Fifth Street
 Tempe, AZ 85280

If to Licensee: AGL Networks, LLC.
 817 W. Peachtree Street, NW, 10th Floor
 Atlanta, GA 30308
 Attn: Mr. Kevin Cox

with a copy to: Norman B. Gerry, Esq.
 Gerry & Sapronov LLP
 Three Ravinia Drive, Suite 1455
 Atlanta, GA 30346

Either party may from time to time designate any other address for this purpose by written notice to the other party in the manner set forth above.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this ____ day of _____, 2003.

MAYOR

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

AGL Networks, LLC,

By _____

Its _____

AGL Networks Tempe

11/07/02

